Fed. R. Bankr. P. 7052
Settlement

Batlan v. Truslow, BAP No. OR-94-1752-HVAs
Adv. No. 93-3456

In re Bullis, Case No. 391-36539-elp7

8/3/95 BAP unpublished

Affirming Judge Perris

The trustee sought to recover a postpetition payment made for the benefit of defendant Truslow, who contended that a prior settlement barred the trustee from recovering the payment. The bankruptcy court held that the settlement did not bar Truslow's liability for the postpetition transfer.

On appeal, the BAP affirmed the bankruptcy court's finding that the trustee did not know of the postpetition transfer at the time of the settlement and that the settlement did not include future unknown claims. The BAP determined that Truslow failed to sustain his burden of proving the that the settlement barred the claim. The BAP also determined that the bankruptcy court complied with Fed. R. Bankr. P. 7052 and Fed. R. Civ, P. 52(a) by stating its findings of fact and conclusions of law orally on the record in open court.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. OR-94-1752-HVAs
HARRY EDWARD BULLIS,	Bk. No. 391-36539-elp7
Debtor.	Adv. No. 93-3456
DAVID W. TRUSLOW, Appellant,	
v.	**M E M O R A N D U M**
MICHAEL B. BATLAN, Trustee, GREEN & MARKLEY, P.C., CHRIS R. MORTON, Esq., and HARRY EDWARD BULLIS, Appellees.	

Argued and Submitted on June 22, 1995
at Portland, Oregon

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: HAGAN, VOLINN, and ASHLAND, Bankruptcy Judges.

99

Plaintiff, Michael B. Batlan, the chapter 7 trustee in the underlying case filed this adversary proceeding against David W. Truslow, attorney Chris R. Morton and the law firm of Green & Markley, P.C., to set aside an unlawful post-petition transfer by the Debtor. On cross-motions for summary judgment, the bankruptcy judge entered judgment in favor of the Plaintiff, Trustee, against the Defendant, David W. Truslow, and in favor of the other Defendants against the Trustee. David W. Truslow appeals the summary judgment against him. For the reasons stated in this Memorandum, we AFFIRM the bankruptcy judge's Order.

FACTS

The Debtor, Harry Bullis, and the Defendant, David W. Truslow ("Appellant"), in this adversary proceeding, had been friends prior to Bullis filing his chapter 7 petition. According to the Appellant, at one time Harry Bullis ("Debtor") had left a large sum of money with him and from time to time would draw on it. After exhausting his own funds the debtor began borrowing from Appellant. In order to secure these loans the Debtor gave certain trust deeds to Appellant.

After the Debtor filed his chapter 7 petition, Appellee Michael B. Batlan ("Trustee") made a preference claim against the Appellant for $79,506.25. This claim was settled for $50,000.00 paid by the Appellant to the Trustee, in addition to a reconveyance of the trust deeds. On November 10, 1992, the Trustee filed with the bankruptcy court a "Motion and Notice of

Intent to Settle" the compromise with the Appellant, and the settlement was shortly thereafter approved by the bankruptcy court.

On September 12, 1993, the Trustee filed this adversary proceeding against the Appellant, Chris R. Morton ("Morton"), and the law firm of Green & Markley, P.C. ("Green & Markley"), to avoid and recover post-petition transfers under the provisions of 11 U.S.C. § § 549(a) and 550. The Complaint alleges that on or about October 1, 1992, the Debtor, Harry Bullis, sold certain real property located at 63220 Silvis Road, Bend, Deschutes County, Oregon, without authorization of the bankruptcy court and contrary to the provisions of the Bankruptcy Code. The complaint further alleges a title company sent two checks representing a part of the proceeds to the Defendant law firm of Green & Markley, totaling $98,000.00, and, on October 5, 1992, Green & Markley, sent a check in the amount of $58,000.00 to attorney Morton for the benefit of Truslow.

Appellant Truslow answered the complaint with affirmative defenses of promissory estoppel, settlement, negligence, failure to litigate damages, failure to state a claim and expiration of the statute of limitations. The only applicable affirmative defenses are those of promissory estoppel and settlement, alleged by the Appellant to have occurred as a result of the November 10, 1992 compromise agreement.

The parties made cross-motions for summary judgment. The summary judgment motions were first considered by the bankruptcy

judge at a telephone conference on March 10, 1994. During the conference, the bankruptcy judge expressed her findings that Defendants Morton and Green & Markley were not immediate transferees and summary judgment of dismissal was ultimately entered against these Defendants. As to Defendant Truslow, however, the bankruptcy judge determined the previous settlement did not bar Truslow's liability to return the proceeds of the sale of the property by him to the Trustee and judgment was ultimately entered against him on April 7, 1994, when the bankruptcy judge issued an order granting partial summary judgment in favor of the Trustee against Truslow. The order reserved a ruling on the amount of the liability.

On April 18, 1994, the bankruptcy judge held another hearing to determine the amount of Truslow's liability. This hearing was also by telephone conference. At the conclusion of that conference, the bankruptcy judge authorized the entry of summary judgment in favor of the Trustee against Truslow in the amount of $26,542.30 as a minimum liability. The Trustee was granted the right to present evidence of additional liability at a trial. The Trustee apparently declined that offer as a final judgment was entered on May 23, 1994 against Defendant Truslow in the amount of $26,542.30 plus interest from February 26, 1993. The Appellant Truslow timely appealed the judgment.

The issue on appeal centers on the sufficiency of the evidence to support the bankruptcy judge's finding that a settlement agreement entered into between the parties prior to

the filing of the adversary complaint did not include the Trustee's cause of action, and thus did not preclude him from bringing the action. The Appellant further claims the bankruptcy judge erred by not entering written findings of fact and conclusions of law.

STANDARD OF REVIEW

The final judgment was entered based on cross-motions for summary judgment. The standard of review is *de novo* as to a grant of summary judgment *In re Nourbakhsh,* 162 B.R. 841, 843 (9th Cir. B.A.P. 1994). Appellants contend the facts as found by the bankruptcy court do not support the conclusion, thus the clearly erroneous standard applies here.

DISCUSSION

The only legitimate issue in this appeal is the sufficiency of the evidence to support the factual finding by the bankruptcy judge that the settlement agreement between the parties did not bar the Trustee from bringing this adversary proceeding. The bankruptcy judge, in her findings of facts and conclusions of law, concluded the preference settlement did not include the Trustee's claim for voidable transfers in the adversary proceeding. This conclusion was based on the bankruptcy judge's findings, based on undisputed facts, that the Trustee did not know of the transfers at the time of the settlement and the settlement did not include future unknown claims. She found Appellant's allegations that the Appellant knew about the transfer of estate funds and had authorized the transfers were

not supported by the record. She further found the Appellant used the trust deeds as leverage to obtain the transfers from the Debtor.

The Appellant argues two letters support a finding the settlement agreement included the Trustee's adversary cause of action. He claims these two letters reflect, or infer, that the settlement agreement released all claims of the estate or the Trustee against Truslow.

The first letter, dated September 29, 1992, was written by Mr. Morton to the Trustee's attorney, Mr. Carlton. The second letter is a response written by Mr. Carlton to Mr. Morton, the next day, September 30, 1992. Neither document contains any information, direct or indirect that would indicate the Trustee was releasing Truslow from any claim against him for receiving a portion of the proceeds from the sale of the property in Deschutes County. Mr. Morton's letter contains the statement "This will resolve any and all claims of the Trustee against David W. Truslow, including but not limited to preferential transfers." Again, there is nothing in the record to indicate the Trustee knew of the sale of the Deschutes County property and the intended distribution of a portion of the proceeds to Truslow.

The property was sold by the Debtor without court authority and the transaction is avoidable by the Trustee under the provisions of Section 549(a) and Section 550 of the Bankruptcy Code. The Defendant has the burden of proof on his affirmative

defense of the effect of the settlement agreement. He has failed to sustain that burden of proof.

The Appellant also urges, as a ground for appeal, the bankruptcy judge's failure to make written findings of fact and conclusions of law. F.R.C.P. 52(a) adopted by F.R.B.P. 7052 specifically provides that findings of fact and conclusions of law are not necessary if "the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence. . . ." This was the procedure followed by the bankruptcy judge.

The Appellant did not appear at the time set for argument either in person or through counsel. Counsel for Trustee made an oral motion for the imposition of sanctions. The motion is DENIED.

The judgment of the bankruptcy court is AFFIRMED.